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THE HONORABLE BENJAMIN H. SETTLE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
TACOMA DIVISION

JOHN DOE #1, an individual; JOHN DOE
#2, an individual; and PROTECT
MARRIAGE WASHINGTON,

Plaintiffs,

v.

SAM REED, in his official capacity as
Secretary of State of Washington and
BRENDA GALARZA, in her official
capacity as Public Records Officer for the
Secretary of State of Washington,

Defendants.

NO. C:09-cv-05456 BHS

INTERVENOR WASHINGTON FAMILIES
STANDING TOGETHER'S TRIAL BRIEF

I. INTRODUCTION

It is Plaintiffs' burden to prove by a preponderance of the evidence that the 137,881 people who signed Referendum 71 (also, "R-71") are members of a minority party, and will face a reasonable probability of serious and widespread harassment that the State is unwilling or unable to control if their names are publicly disclosed. Although different jurists word the precise standard for this as-applied exemption differently, at least five U.S. Supreme Court Justices have explained that given the important public interest of public disclosure at stake Plaintiffs must face an uphill battle in this precise case. As will be demonstrated in this trial brief and by the evidence presented at trial, Plaintiffs have not shown either their minor party

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1 status or a probability of threat to be anywhere near the standard required by the U.S. Supreme
 2 Court. At the conclusion of this trial, Intervenor Washington Families Standing Together
 3 ("WAFST") respectfully submits,. . .

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6 **II. PROCEDURAL HISTORY**

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8 Protect Marriage Washington (also, "PMW") filed this action on July 28, 2009, raising
 9 facial (Count I) and as-applied (Count II) challenges to the public disclosure of the R-71
 10 petitions. Count I was rejected 8-1 by the U.S. Supreme Court in *Doe v. Reed*, 130 S. Ct. 2811
 11 (2010). Count II is now before the Court.

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14 In their disclosures and during discovery, Plaintiffs identified nineteen witnesses. The
 15 State Defendants, WAFST, and intervenor Washington Coalition for Open Government
 16 ("WCOG") deposed all but one (a minor child) of Plaintiffs' proposed witnesses. In response to
 17 a request from the Court to submit supplemental summary judgment briefing, Plaintiffs candidly
 18 conceded that they have no evidence that people who merely signed the R-71 petitions have been
 19 subjected to threats, harassments, or reprisals.¹ Dkt. #259. Defendant Protect Marriage
 20 Washington ("PMW") also sent out emails requesting any evidence of harassment of the R-71
 21 petition signers, and received nothing in response. Similarly, although the identities and contact
 22 information of those who contributed to defendant Protect Marriage Washington are posted on
 23 the Public Disclosure Commission's website—and have been for over two years—Plaintiffs have
 24 presented no evidence that any PMW contributor was harassed or threatened. Instead, Plaintiffs
 25 apparently seek to rely instead on a large collection of undifferentiated material, the vast
 26 majority of which has no relevance to the issues before the Court and, as explained below, is
 27 inadmissible for a variety of additional reasons as well.

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¹ Plaintiffs' assertion, in that supplemental briefing, that the identity of persons who "simply signed" R-71 petition is unknown and thus such individuals could not possibly have been harassed because they signed is incorrect. People generally signed the petition in highly public places, and may have otherwise disclosed that they signed the petition. Plaintiffs' inability to present evidence that a single person was harassed or threatened because he or she signed the R-71 petition speaks volumes.

1 Based on the paucity of evidence to support Plaintiffs' as-applied challenge, the State,
 2 WAFST, and WCOG moved for summary judgment. These motions are currently pending. The
 3 State, WAFST, and WCOG have also filed motions in limine to exclude certain of Plaintiffs'
 4 proposed evidence. These motions are also pending.
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8 **III. EXPECTED TRIAL TESTIMONY**

9 Throughout this case, Plaintiffs have made sweeping claims regarding threats and
 10 harassment that R-71 signers will face if their names are released. On remand from the Supreme
 11 Court, and on a more fully developed record, it is now clear that Plaintiffs' evidence falls far
 12 short of their heavy burden.
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15 **A. R-71 Petition-Signature Process and Vote**

16 In 2009, the Washington State Legislature enacted Engrossed Second Substitute Senate
 17 Bill 5688 ("E2SSB 5688"), an enhanced domestic partnership law expanding the rights and
 18 responsibilities accorded to registered same-sex partners and opposite-sex senior partners.
 19 Protect Marriage Washington ("PMW") filed paperwork with the Public Disclosure Commission
 20 to become a political action committee and, in May 2009, PMW began gathering signatures to
 21 put R-71 before Washington voters.
 22
 23

24 The circulators gathered signatures in public places, such as community events, county
 25 fairs, storefronts, and shopping malls. Each petition sheet contained twenty lines for signatures,
 26 printed names, and contact information, including home addresses and email addresses. Nothing
 27 shielded these signatures, printed names, addresses, or email addresses from the view of others
 28 who read or signed the petitions, or from the people circulating the petitions. Nothing on the
 29 petitions indicated that this information would be kept confidential. In fact, the State's practice
 30 in prior elections had been to make petitions publicly available in response to public disclosure
 31 requests.
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34 By the July 25, 2009 deadline, PMW and other volunteers had gathered 137,881
 35 signatures. The Washington Secretary of State's office concluded that the petitions contained
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1 more than 15,000 signatures that were invalid and approximately 121,757 valid signatures of
 2 registered voters, 1,180 more than the minimum required to qualify R-71 for the ballot.
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10 On November 3, 2009, 53.15% of voters (951,822 voters) approved E2SSB 5688, while
 11 46.85% (838,842 voters) rejected it, making E2SSB 5688 law and Washington the first state in
 12 the country to vote affirmatively in support of relationship recognition for LGBT individuals.
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15 **B. Plaintiffs' Evidence**

16 Plaintiffs have identified only four witnesses who will testify in person at trial, [REDACTED]
 17 [REDACTED], and Plaintiffs' counsel James Bopp, Jr.
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20 (or someone else from Mr. Bopp's office); and have further identified fourteen witnesses who
 21 they propose having testify by deposition. WAFST objects to Plaintiffs' untimely identification
 22 of Mr. Bopp as a witness, whom Plaintiffs propose to call to attempt to authenticate Plaintiffs'
 23 many trial exhibits, the vast majority of which are materials printed from the Internet. WAFST
 24 also objects to and will oppose Plaintiffs' motion seeking to use deposition testimony because
 25 Plaintiffs have not made a showing of "exceptional circumstances" within the meaning of
 26 Federal Rule of Civil Procedure 32(a)(4)(D) with respect to most of the witnesses whose
 27 testimony Plaintiffs intend to offer by deposition but whom are within easy subpoena reach and
 28 could testify in person. (In a classic attempt to bootstrap, Plaintiffs contend that the volume of
 29 irrelevant Internet material Plaintiffs intend to introduce justifies submission of testimony-by-
 30 deposition as a time-saving measure.)
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38 The live testimony Plaintiffs will offer will do little to advance Plaintiffs' case. Plaintiffs'
 39 witnesses will baldly admit that they have no serious concerns if the fact that they signed the R-
 40 71 petitions is disclosed, that they have experienced no substantial harassment even though they
 41 publicly support R-71, and that the few times they felt it necessary to call the police, the police
 42 have been both willing and able to come swiftly to their aid. Law enforcement witnesses will
 43 confirm that the police responded promptly and fully whenever contacted by Plaintiffs'
 44 witnesses.
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1 [REDACTED] is [REDACTED] and describes himself as extremely public
 2 on the R-71 campaign. He testified in front of 300 spectators against E2SSB 5688 and willingly
 3 gave his name and address at that public hearing. His name is listed prominently on [REDACTED]
 4 website, and he has participated in numerous public debates, and has made other appearances,
 5 regarding R-71. Despite his overtly public stance on R-71, he has felt personally threatened on
 6 only two occasions. Once, a blogger wrote, "Why can't we go to Arlington and harm his
 7 family?" [REDACTED] contacted the police, who responded promptly. [REDACTED] thereafter
 8 reported no further incidents involving the blogger. The other time involved his daughter
 9 informing him that a man was outside their house taking pictures. [REDACTED] did not contact
 10 the police, and he cannot link the incident to his signing of R-71. [REDACTED] also received
 11 phone calls from a person he perceived as bothersome, but he did not feel he needed to report the
 12 calls to the police. [REDACTED] testimony will show that, as perhaps the most public face of
 13 the R-71 campaign, he has not suffered any serious or widespread harassment that law
 14 enforcement was unwilling or unable to control. His testimony is patently insufficient to support
 15 the claim.

16 [REDACTED] has also provided public support throughout the R-71 process. He
 17 testified in front of the State legislature, gathered petition signatures in public places, and
 18 participated in television interviews. He, too, does not fear having his name publicized and is
 19 not secretive about his opinions regarding R-71. Despite his public stance on the R-71 issue, he
 20 too will testify to only a few instances of alleged harassment, including the following: a couple
 21 chastising him that "[w]e have feelings too"; a person asking him why he was collecting
 22 signatures for R-71 and suggesting she might attend his church services; a young woman taking
 23 his picture while he gathered signatures; and a person asking a store manager to make [REDACTED]
 24 [REDACTED] leave the premises and collect R-71 petition signatures elsewhere. [REDACTED]
 25 testimony will establish that he does not fear having his name disclosed, and that, even with all
 26

1 of his public appearances regarding R-71, he has not suffered anything close to the kind of
 2 serious harassment that is necessary to sustain Plaintiffs' burden of proof.
 3

4 [REDACTED], was public in her support of R-71. She spent
 5 at least ten days in front of large stores gathering approximately 1,000 for the R-71 effort. She
 6 testified before the State legislature. She led her group's efforts for more than a month at the
 7 Secretary of State's office during the signature verification process. And she publicly voiced her
 8 opinions on radio stations and in newspaper interviews. She does not fear saying that she
 9 supported R-71. In addition to the incidents [REDACTED] described, [REDACTED] also recalled
 10 that she received phone calls from a person who asked why she was collecting signatures for R-
 11 71 and who mentioned that she and her friends would come to [REDACTED] church and she
 12 withdrew an application for a volunteer position because of perceived hostility to her political
 13 views. [REDACTED] also felt, on one occasion, that a disagreement with a salon owner about
 14 whether the haircut she sought should be classified as a \$2 bang trim or a \$60 haircut was
 15 prompted by her position on traditional marriage, apparently because she perceived the salon
 16 owner to be "openly homosexual" (R-71 was not mentioned during the exchange and there is no
 17 other evidence of any sort linking the price of her haircut to her position on R-71). Like [REDACTED]
 18 [REDACTED] testimony, [REDACTED] testimony will not help Plaintiffs meet their heavy burden of
 19 establishing serious and widespread harassment against R-71 signers that the State is unwilling
 20 or unable to control because even as a public persona for the R-71 campaign, [REDACTED] was
 21 not subjected to any substantial harassment beyond some bothersome conversations with people
 22 who disagreed with her views regarding R-71.
 23

24 The same is true of Plaintiffs' other witnesses, even assuming the Court grants Plaintiffs
 25 latitude to use their deposition testimony. The testimony of each of Plaintiffs' possible
 26 witnesses, singly and in combination, will fail to sustain Plaintiffs' burden of proof. These
 27 witnesses' evidence of alleged threats and harassment consists of a few uncomfortable exchanges
 28 between R-71 proponents and opponents and heated rhetoric during a hotly contested campaign.
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1 Plaintiffs' witnesses do not have substantial concerns about disclosing their names. Even though
 2 Plaintiffs' witnesses intentionally publicized their positions regarding R-71, they did not
 3 generally experience the sort of harassment that led them to contact the police. And the few
 4 times they did contact law enforcement, the police promptly attended to the callers' needs and
 5 addressed the callers' concerns. Therefore, Plaintiffs' witnesses will not be able to help Plaintiffs
 6 establish that R-71 signers, if their names are disclosed, will face a reasonable probability of
 7 serious and widespread harassment that the State will be unable or unwilling to control.
 8

9
 10 Indeed, testimony presented by the State Defendants and/or WAFST from long-term
 11 Republican and Democratic political operatives will confirm that the type of activity described
 12 by Plaintiffs' witnesses as threats or harassment (stolen or destroyed campaign signs, rude
 13 gestures or words directed to persons waving campaign signs, etc.) are part and parcel of almost
 14 any high-profile political campaign, on either side of the aisle. Plaintiffs will fail to show that
 15 run-of-the-mill campaign unpleasantries entitle Plaintiffs to an exemption from Washington's
 16 Public Records Act. Indeed, such an exemption would have far reaching consequences given the
 17 relative commonplace and typical nature of the interactions so breathlessly described as
 18 "threatening" by Plaintiffs.
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 21 **C. Plaintiffs' Documentary Evidence**
 22

23 Plaintiffs have proposed the introduction of 263 exhibits. Dkt. 253 (Pls.' Pretrial
 24 Statement). These 263 exhibits consist primarily of online materials, such as newspaper articles,
 25 blog posts, and YouTube videos. Most of these materials pertain to events occurring outside of
 26 Washington and that relate to different issues, most prominently Proposition 8 (also, "Prop. 8")
 27 in California.²
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² The district court that reviewed the evidence of alleged threats and harassment from the Prop. 8 campaign concluded that evidence *fails* to meet the high standard for an as-applied exemption to disclosure. *See ProtectMarriage.com v. Bowen*, 599 F. Supp. 2d 1197 (E.D. Cal. 2009). Nonetheless, Plaintiffs in this case rely very heavily on this same evidence.

1 Plaintiffs filed some of these materials in support of their Motion for Summary Judgment.
 2 The State Defendants (joined by WAFST and WCOG) moved to strike the evidence on various
 3 grounds. Dkts. #224 & 231. When these materials and other similar materials reappeared in
 4 Plaintiffs' Pretrial Statement, Dkt. #253, the State Defendants, WAFST, and WCOG filed
 5 Motions in Limine seeking to exclude these materials on multiple grounds. Dkts. #251, 255,
 6 257. Plaintiffs now propose to use one of their attorneys, James Bopp, Jr., to authenticate these
 7 materials. Even had Mr. Bopp (or another lawyer from Mr. Bopp's law firm) been timely
 8 disclosed, he cannot authenticate these materials because (1) it is apparent from previously-
 9 submitted declarations of Mr. Bopp's former associate, Jared Haynie, that Mr. Haynie did not
 10 personally access and print each of the documents from the Internet (and that Mr. Bopp himself
 11 did not do so), and (2) Mr. Bopp cannot in any event authenticate the documents posted on the
 12 webpages he seeks to authenticate, such as embedded YouTube videos.³ In any event, these
 13 materials are also inadmissible hearsay, and they often contain multiple layers of hearsay. Some
 14 of them are anonymous and don't even identify the name of the declarant. The evidentiary
 15 problems with such an approach are self evident. State Defendants, WAFST, and WCOG have
 16 objected to Plaintiffs' attempt to use the residual hearsay exemption without specifying the name
 17 and address of the declarants and without attempting to show that the offered materials are more
 18 probative than any other evidence that could be procured through reasonable efforts, as required
 19 by the residual hearsay exception. Plaintiffs cannot lay adequate foundation for these
 20 documents, as Plaintiffs have not named anyone who can testify regarding creation or generation
 21 of the original materials.

22 Moreover, even if Plaintiffs could authenticate and lay foundation for the internet
 23 materials and overcome the hearsay nature of the documents, these materials are simply not
 24 relevant to this case. It is Plaintiffs' burden to establish that *R-71 signers* would likely be
 25

26 ³ Plaintiffs previously offered Mr. Haynie as a witness, until Mr. Haynie withdrew as counsel of record on
 27 September 1, 2011. Dkt. #262.

1 subjected to harassment if their names were disclosed, not that people involved in the Prop. 8
 2 campaign in another state (and in various capacities more public than merely signing a petition)
 3 or other campaigns on different subjects elsewhere in the country might have been harassed
 4 because of their views at some point in time.
 5

6 Plaintiffs have also proposed introducing, as Trial Exhibit 249, a collection of John Doe
 7 declarations from *ProtectMarriage.com*. WAFST has moved to exclude this exhibit because
 8 Plaintiffs did not identify these declarants in response to this Court's scheduling order, Dkt. #255,
 9 and the State Defendants have moved to exclude this exhibit on hearsay grounds, Dkt. #251.
 10 These declarants are not available to Defendants for cross-examination – either before trial or
 11 during – and their out-of-court statements are obviously being offered to prove the truth of the
 12 matter asserted. The suggestion that unnamed anonymous declarations could be offered without
 13 ever identifying the witnesses or allowing the Court or opposing counsel a fair opportunity to
 14 examine the witnesses on their knowledge, bias, or foundation for their testimony is frankly
 15 absurd. These materials should be rejected at the outset and without further discussion. (The
 16 declarations are in any event irrelevant because they do not address Washington's R-71 campaign
 17 or association with PMW).
 18

19 Finally, Plaintiffs intend to offer photographs, email, letters, and recordings not created
 20 by their witnesses. The State Defendants' Motion in Limine moves to exclude these items as
 21 well on authentication grounds. *See* Dkt. 251.
 22

23 WAFST asserts that few of Plaintiffs' proposed exhibits will meet the standards necessary
 24 for admission into evidence and that, therefore, Plaintiffs' documentary evidence will do little to
 25 help Plaintiffs meet their heavy burden of proof.
 26

27 IV. LEGAL STANDARD

28 As a default rule, a State may publicize the names and addresses of citizens who have
 29 signed a referendum petition. *Doe v. Reed*, 130 S. Ct. 2811, 2815 (2010). The First Amendment
 30 provides a narrow exemption from this general disclosure requirement if a minor party can
 31

1 establish "a reasonable probability that the compelled disclosure of a party's . . . names will
 2 subject them," *Brown v. Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U.S. 87, 93 (1982),
 3 to "serious and widespread harassment that the State is unwilling or unable to control," *Doe*, 130
 4 S. Ct. at 2829 (Sotomayor, J., concurring); *see also id.* at 2831 (Stevens, J., concurring) (noting
 5 that a plaintiff must show that harassment "cannot be mitigated by law enforcement measures").
 6

7 Five of the U.S. Supreme Court Justices who heard this case on the facial challenge
 8 offered guidance regarding Plaintiffs' substantial burden on establishing its case on the as-
 9 applied challenge. Justices Sotomayor, Stevens, and Ginsburg called Plaintiffs' burden "heavy,"
 10 explaining that "[a]llowing case-specific invalidation under a more forgiving standard would
 11 unduly diminish the substantial breathing room States are afforded to adopt and implement
 12 reasonable, nondiscriminatory measures like the disclosure requirement now at issue." *Doe*, 130
 13 S. Ct. at 2829 (Sotomayor, J., concurring). Justices Stevens and Breyer agreed that Plaintiffs
 14 must produce "strong evidence" to meet their burden. *Id.* at 2931 (Stevens, J., concurring).
 15 Justices Stevens and Breyer, and also Justice Scalia, all noted their skepticism that any plaintiff
 16 could obtain an as-applied exemption to petition-disclosure laws. *See id.* at 2831 (Stevens, J.,
 17 concurring) (noting that it is "unlikely" that an as-applied challenge could succeed in "cases
 18 involving the [Public Records Act]"); *id.* at 2836-37 (Scalia, J., concurring) ("[T]here is no
 19 constitutional basis for this Court to impose [a requirement to keep petition signatures secret]
 20 upon the States And it may even be a bad idea to keep petition signatures secret.").
 21

22 This is Plaintiffs' burden in this case—a heavy burden to establish that R-71 signers are a
 23 minor political party who, if their names are disclosed, will be subjected to "serious and
 24 widespread harassment that the State is unable or unwilling to control." *Doe*, 130 S. Ct. at 2829
 25 (Sotomayor, J., concurring). Plaintiffs will be unable to meet their burden.
 26

27 **A. Minor Party Status**

28 Only minority groups may achieve an exemption from the publication rule. *E.g., Doe*,
 29 130 S. Ct. at 2820-21 (noting "'minor parties' may be exempt from disclosure requirements")
 30

(quoting *Buckley v. Valeo*, 424 U.S. 1, 74 (1976) (per curiam)); *Brown*, 459 U.S. at 94 (calling the exemption the "minor party exemption"). In fact, "minor status is a necessary element of a successful as-applied claim." *ProtectMarriage.com v. Bowen*, 599 F. Supp. 2d 1197, 1216 (E.D. Cal. 2009). The Eastern District of California has held that proponents of a constitutional amendment defining marriage as being between a man and a woman are not part of a minor party. *See ProtectMarriage.com*, 599 F. Supp. 2d 1215-16. Instead, minor parties are those "with little chance of winning an election," and which "are less likely to have a sound financial base." *Buckley*, 424 U.S. at 70-71. One example is the Socialist Workers Party during the 1980s, "a small political party with approximately sixty members in the State of Ohio," which had "little success at the polls," and whose "expenditures in Ohio . . . averaged about \$15,000 annually." *Brown*, 459 U.S. at 88-89.

Plaintiffs will not be able to establish that the 137,881 people who signed R-71 are in the first instance anything other than an array of voters with no association other than having signed a petition, let alone a minority party "with little chance of winning an election." *Buckley*, 424 U.S. at 70-71. In fact, voters in twenty-nine of Washington's thirty-nine counties, or 47% of those who voted on R-71, agreed with the signers. And, unlike the Socialist Workers Party, while Plaintiffs did not win the R-71 election, likeminded persons historically have prevailed on every other statewide ballot measure across the country seeking to limit the recognition of same-sex relationships. *See* Jane S. Schacter, *The Other Same-Sex Marriage Debate*, 84 Chi-Kent L. Rev. 379, 385-86 (2009). Indeed, Plaintiffs have not even attempted to proffer evidence of the signers' minority status. That is because Plaintiffs cannot meet this burden.

B. Party Status

Because the purpose of the *minor-party* exemption is to ensure that disclosure requirements do not impinge on a protected associational activity, *see Buckley*, 424 U.S. at 73, only groups that associate may seek such an exemption. People who sign a referendum petition do not constitute that sort of associational group: they may not even agree on the single issue

1 presented in the petition, and some may sign the petition merely to "express[] the political view
 2 that the question should be considered by the whole electorate." *See Doe*, 130 S. Ct. at 2817
 3 (internal quotation marks and citation omitted); *Jenness v. Fortson*, 403 U.S. 431, 438-39 (1971)
 4 (explaining that a voter may sign a petition to place a candidate on the ballot and then decline to
 5 vote for that candidate at the election). Moreover, even if everyone who signed a referendum
 6 petition agreed on that one issue presented in the petition, one issue hardly defines individuals as
 7 a group whose associational interests are in need of protection. Indeed, many who have signed
 8 petitions for the wide variety of measures on the ballot in Washington State over the years would
 9 be surprised to learn they had any sort of associational interest with other signers.

10 Here, too, Plaintiffs' evidence will fail to meet their burden. Plaintiffs' Pretrial Statement
 11 suggests no evidence regarding the vast majority of petition signers, so Plaintiffs will fail to meet
 12 their burden of establishing that the R-71 signers are a "party."

13 **C. Reasonable Probability Serious and Widespread Harassment**

14 Even if Plaintiffs are a minority and a party (and they are neither), Plaintiffs must still
 15 meet a "substantial burden," *Doe*, 130 S. Ct. at 2831 (Stevens, J., concurring), of establishing
 16 that R-71 signers would face a "reasonable probability of serious and widespread harassment" if
 17 their names were disclosed, *id.* at 2829 (Sotomayor, J., concurring).

18 If Plaintiffs were a "new part[y] that ha[s] no history upon which to draw," Plaintiffs
 19 "may be able to offer evidence of reprisals and threats directed against individuals or
 20 organizations holding similar views." *Buckley*, 424 U.S. at 74. But Plaintiffs will not be able to
 21 establish that they are a "new party," even if this Court finds that they are a "party." PMW was
 22 constituted on May 13, 2009. The list of PMW's donors has been publicly available on the
 23 Public Disclosure Commission's website since June 2009. Therefore, PMW has more than two
 24 years of directly relevant history from which to draw.

25 Because PMW is not a "new party" with no history upon which to draw, Plaintiffs must
 26 offer "specific evidence of past or present harassment of *members* due to their associational ties,

1 or harassment directed against the *organization* itself." *Buckley*, 424 U.S. at 74 (emphases
 2 added). Plaintiffs will not be able to meet their heavy burden with probative, admissible
 3 evidence. Plaintiffs admit that they have no evidence that even a single R-71 petition signer has
 4 been harassed because he or she signed an R-71 petition, despite PMW's efforts to solicit such
 5 evidence. Plaintiffs have produced no evidence that PMW's donors have been harassed, despite
 6 the fact that donor information has been publicly available on the Internet for over two years.
 7 Nor will Plaintiffs be able to present any admissible evidence that people refused to sign the R-
 8 71 petition out of concern that their names would become public.
 9

10 **D. Law Enforcement Unable or Unwilling to Control Harassment**

11 Finally, five Justices of the U.S. Supreme Court have indicated that, for a plaintiff to
 12 succeed on an as-applied challenge, the plaintiff must prove not only serious harassment, but also
 13 that law enforcement is unwilling or unable to control the harassment. *See Doe*, 130 S. Ct. at
 14 2829 (Sotomayor, J., concurring); *id.* at 2831 (Stevens, J., concurring) ("[F]or an as-applied
 15 challenge to a law such as the [Public Records Act] to succeed, there would have to be a
 16 significant threat of harassment directed at those who sign the petition that cannot be mitigated
 17 by law enforcement measures."); *id.* at 2837 (Scalia, J., concurring) ("There are laws against
 18 threats and intimidation.").
 19

20 Plaintiffs will not be able to meet this standard at trial either. The witnesses who were
 21 deposed admitted that they did not usually find the alleged harassment so serious as to require
 22 calling the police. The few times a witness did call the police, the police promptly attended to
 23 the callers' needs and the alleged harassment thereafter ceased.
 24

25 **V. STANDARD FOR GRANT OF JUDGMENT ON PARTIAL FINDINGS UNDER
 26 RULE 52(c)**

27 WAFST believes Plaintiffs will be unable to establish their burden of proving that R-71
 28 signers are members of a minor party who, if their names are disclosed, will be subjected to
 29 serious and widespread harassment that law enforcement in Washington will be unwilling and
 30

unable to control. WAFST therefore anticipates moving under Federal Rules of Civil Procedure 52(c) for a judgment on partial findings.

Rule 52(c) governs such judgments in bench trials, and it provides in full as follows:

Judgment on Partial Findings. If a party has been fully heard on an issue during a nonjury trial and the court finds against the party on that issue, the court may enter judgment against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue. The court may, however, decline to render any judgment until the close of the evidence. A judgment on partial findings must be supported by findings of fact and conclusions of law as required by Rule 52(a).

In ruling on a Rule 52(c) motion, the court weighs the evidence, resolves conflicts, and determines the plaintiff has met its burden of proof. *See Ritchie v. United States*, 451 F.3d 1019, 1023 (9th Cir. 2006). The court does not consider the evidence in the light most favorable to the nonmoving party or draw any other special inferences in the nonmovant's favor. *Id.*

Because WAFST believes that Plaintiffs will not be able to establish that (1) the 137,881 people who signed R-71 espouse historically marginalized minority views, (2) constitute an associational group, (3) and will face a reasonable probability of serious and widespread harassment, that (4) the State will be unwilling or unable to control, WAFST anticipates moving for a judgment on partial findings under Rule 52(c).

DATED: September 6, 2011

s/ Kevin J. Hamilton, WSBA No. 15648

Kevin J. Hamilton, WSBA No. 15648

William B. Stafford, WSBA No. 39849

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C06-0045 RSM) – 14
LEGAL 21625333.1

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CERTIFICATE OF SERVICE

I certify that on September 6, 2011, I electronically filed the foregoing **INTERVENOR WASHINGTON FAMILIES STANDING TOGETHER'S TRIAL BRIEF** with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following attorneys of record.

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2 I certify under penalty of perjury that the foregoing is true and correct.
3
4 DATED this 6th day of September, 2011.
5
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CERTIFICATE OF SERVICE (No. C06-0045
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